IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 354/2005

1. Mrs. Eugenia Palha and another. ..... Petitioners.

V/s.

1. Mr. Shrinivas Ramnath Camotin Bamolkar alias Shrinivas Kamat Bamolkar. ..... Respondents.

Shri Melvin A. Viegas, Advocate for the petitioners.

Shri J. P. Mulgaonkar, Advocate for the respondents No.6 and 7.

CORAM : R.M.S. KHANDEPARKAR, J.

DATE : 27TH JANUARY, 2006.

P.C.

Heard the learned Advocates for the petitioners and the for the respondents No.6 and 7. None present for the other respondents, though duly served. Notice was issued for final disposal of the petition at the admission stage.

2. The challenge in the petition is to the impugned order whereby while allowing the amendment application partly, only few paras sought to be amended and introduced in the plaint, have been disallowed on the ground that by those paras the petitioners are seeking to introduce a new case without laying any foundation in the

plaint. The relevant portion of the impugned order reads thus :

> " I am in full agreement with the Ld. Adv. Bodke that the plaintiffs have prayer in the plaint for a mandatory injunction whereby the plaintiffs had sought restoration of the access which is alleged to be encroached . As far as para 32(L) is concerned, the plaintiffs are trying to introduce a totally new case which will entirely change the nature of the suit and being barred by limitation."

On above ground the petitioners have not been allowed to amend the petition by introducing the proposed para 32(L). Consequently, the trial Court has also rejected the proposed amendment for introduction of para 17A and further amendment to para 20 of the plaint. The amendment by way of introduction of the proposed para 17A, para 20 of the plaint and introduction of para 32(L) were listed under paras 7, 8 and 9 of the application for amendment dated 15.2.05.

3. As rightly submitted by the learned Advocate for the petitioners that a plain reading of paras 2, 7 and 8 of the plaint discloses that the foundation to claim right of easement of necessity was clearly laid down by way of pleadings in the said paras. Paras 2, 7 and 8 of the plaint, read thus :

> "2. The entire property earlier belonged to defendants No.1 to 5.

> 7. The Plaintiffs state that vide deed of sale dated 26/3/1998 registered in the office of the sub-registrar, Ilhas, Panaji under No.566 at Pages 309 to 332 of Book-I, Vol. 669 dated 31.3.98, the defendant No.1 to 5 sold `B' having area of 1351 sq. metres, including area of the house of the plaintiffs, to the plaintiffs which is part of the entire property.
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> 8. The plaintiffs state that as they required access to come to public road from their house, the defendant No.1 to 5 kept 4 metres vide access road through the remaining portion of the entire property which is identified as plot `A' ".

4. The trial Court rejected the above referred portion from the application for amendment solely on the ground of absence of pleadings in relation to the claim of access on the basis of easement of necessity and on the ground that if the amendment is allowed, it would amount to introduction of new case on that count. Considering the pleadings in the plaint quoted herein above, it is apparent from the above that the said finding is totally contrary to the materials on record and, therefore, cannot be sustained. It apparently discloses that the Court below had rejected the portion of the application for amendment arbitrarily and without considering the pleadings in the plaint in relation to the claim for access on the basis of easement of

necessity. On this count alone, the impugned order cannot be sustained and is liable to be set aside and the application dated 15.2.05 needs to be allowed in toto.

5. Accordingly, the impugned order is, hereby, set aside. Application dated 15.2.2005 needs to be allowed in its entirety as the proposed amendments would clearly help the Court in determining the real question in controversy.

6. In the result, therefore, the petition succeeds and the same is allowed in terms of prayer clause (i) with no order as to costs. The amendment to be carried out within 15 days from the receipt of Writ of this Court by the trial Court. The defendants shall be at liberty to file additional written statement.

R.M.S. KHANDEPARKAR, J.

ssm.